Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-885

COUNTY OF MIDDLESEX,
PETITIONER,

v.

GEVYN CONSTRUCTION CORP.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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No.

COUNTY OF MIDDLESEX,
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v.

GEVYN CONSTRUCTION CORP.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner County of Middlesex respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on October 28, 1971.

Opinions Below.

The opinions of the Court of Appeals and of the District Court for Massachusetts are not yet reported. They appear in the Appendix hereto at pages 13 and 18, respectively.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on October 28, 1971. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented.

Did the lower courts commit reversible error in ordering petitioner to arbitrate certain disputes arising out of a construction contract despite its offer to prove a material breach *of the arbitration clause* itself by virtue of respondent's work stoppage?

Statutes Involved.

Sections 2 and 4 of the United States Arbitration Act, 9 U.S.C. §§1-14, provide in relevant part:

Section 2:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[1]

[1] Section 2 provides:

"*A written provision in any* maritime transaction or a *contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction*, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.*"

Section 4:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.[2]

[2] Section 4 provides:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be made in the manner provided by the Federal Rules of Civil Procedure. *The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.* The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. *If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.* If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specifically call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Statement of the Case.

Petitioner, the County of Middlesex, filed a petition in the state court seeking a declaration that it was not obligated to arbitrate a dispute with respondent, Gevyn Construction Corporation, arising out of a contract between the parties for the construction of a new county courthouse in Cambridge, Massachusetts. Respondent removed the case to the United States District Court for Massachusetts. In the district court petitioner moved for a summary judgment that it was not required to arbitrate; respondent, in turn, moved for an order compelling arbitration. The district court denied the motion for summary judgment, granted an order compelling arbitration, and stayed all further judicial proceedings. (App. pp. 18-20) The court of appeals affirmed. (App. pp. 13-18) This petition followed.

The lower courts did not purport to resolve any possible evidentiary conflicts; indeed, the district court denied the petitioner's motion for summary judgment on the express ground that it involved disputed questions of facts. (App. p. 18) In ordering arbitration, therefore, the lower courts necessarily concluded that the defense asserted was insufficient as *a matter of law* to prevent arbitration. Accordingly, the sole question here is whether petitioner's complaint alleges facts sufficient to warrant an evidentiary hearing.

The material facts alleged in the complaint are summarized by the court of appeals as follows:

> "This issue arises, one of many, from a singularly unhappy contract to construct a courthouse for the County of Middlesex by Gevyn Construction Corp. After mounting difficulties in the spring of 1970, when the parties negotiated concerning a claim by Gevyn for damages for delay occasioned by additional work, *each party's dissatisfaction with the other mounted to the point where Gevyn threatened to and allegedly*

> *did suspend work on the project*[3] and the County terminated its contract with Gevyn. The County sued . . . seeking a declaration that it was not obligated to arbitrate a number of matters pending before the American Arbitration Association, including the two at issue here—one being Gevyn's claim for delay damages and the other being its claim that the County wrongfully terminated the contract. . . . (App. pp. 13-14)

The construction contract between the parties contained the following provisions pertaining to arbitration.

> 7.10 Arbitration.
>
> 7.10.1 All claims, disputes and other matters in question arising out of, or relating to this Contract or the breach thereof, except as set forth in Subparagraph 2.2.9 with respect to the Architect's decisions on matters relating to artistic effect, and except for claims which have been waived by the making or acceptance of final payment as provided by Subparagraphs 9.7.5 and 9.7.6, shall be decided by arbitration in accordance with the Construction Industry Arbitration Association [sic] then obtaining unless the parties mutually agree otherwise. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.
>
> 7.10.2. Notice of the demand for arbitration shall be filed in writing with the other part to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect. The demand for arbitration shall be made within the time limits speci-

[3] Emphasis supplied throughout this petition.

fied in Subparagraphs 2.2.10 and 2.2.11 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall it be made after institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

7.10.3 *The Contractor shall carry on the Work and maintain the progress schedule during any arbitration proceedings, unless otherwise agreed by him and the Owner in writing.*

Petitioner urged unsuccessfully in the courts below that the agreement between the parties expressly prohibited respondent from engaging in a work stoppage for the purpose of securing its demands, and that this was the *quid pro quo* for petitioner's obligation to arbitrate. Accordingly, in wilfully and intentionally breaching this provision respondent thereby forfeited any right to insist upon arbitration. And, petitioner urged, whether the work stoppage constituted a material breach of the arbitration clause was an issue for the court in determining whether to order arbitration.

Reasons for Granting the Writ.

Petitioners' argument is simply stated: under the United States Arbitration Act, 9 U.S.C. §§1-14,[4] a court may not order arbitration *unless it has been satisfied that there has been no material breach* of the arbitration agreement between the parties. We submit this position with deference because it has been characterized as frivolous by both courts

[4] Petitioner makes no argument here that the United States Arbitration Act is inapplicable because the case was removed from the state court, or is inapplicable for any other reason.

below.[5] We respectfully, but earnestly, disagree; and we submit that the courts below decided erroneously an issue of great importance in the administration of the federal arbitration act.

A.

Section 2 of the United States Arbitration Act makes arbitration agreements enforceable "save upon grounds that exist in law or equity for the revocation of any contract." Section 4 directs the district court to order enforcement unless "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be an issue." The critical question under these provisions is the extent to which a court asked to enforce an arbitration agreement ("the enforcement court") should consider events *after the making of the arbitration agreement.* A consensus seems to be slowly emerging in the lower federal courts that no events after the making of the agreement can be considered. In *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F.2d 568 (2 Cir. 1968) a divided court held that the issue of laches was for the arbitrator.[6] In *Halcon International, Inc.* v. *Monsanto Australia, Lmt.*, 446 F.2d 156 (7 Cir. 1971), *cert. den.* 404 U.S. —, a divided court of appeals for the Seventh Circuit reached the same result. And in this case the court of appeals held that the issue of material breach was for the arbitrator.

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[5] See Appendix p. 19 for the view of the district court. In denying petitioners' motion for a stay of the mandate, the court of appeals observed that:

> "In its original opinion it was only out of respect to counsel that the court failed to state that it considered appellant's interpretation of the word "revocation" as used in this statute to be frivolous."

[6] Earlier the Second Circuit had concluded that "waiver" was an issue for arbitration, not the court. *World Brilliance Corp.* v. *Bethlehem Steel*, 342 F.2d 362 (2 Cir. 1965).

An examination of these cases shows that their rationales are not entirely consistent. For example, despite respondent's urging[7] the court of appeals in this case refused to conclude that *no* events occurring after the making of the agreement were properly cognizable by an enforcement court. Rather, it held that at least one such event—mutual recision by the parties—should be considered by the enforcement court. (App. p. 18) Apparently the court of appeals assumed that mutual recision was a situation in which the arbitration agreement was "revoked" within the meaning of section 2. We accept that analysis. But we are at a loss to understand why the word "revocation", which includes mutual recision, does not include unilateral recision. *Unlike a claim of waiver or laches,* a material breach of any contract permits recision of the contract. E.g., *United States* v. *Southern Const. Co.*, 293 F.2d 492, 498 (6 Cir. 1961); Williston, *Contracts*, §§1455, 1467 (2 ed. Jaeger). That a work stoppage can constitute a material breach of a construction contract admits of no doubt. See, for example, the discussion and authorities cited in *Pacific Coast Engr. Co.* v. *Merritt-Chapman & Scott Corp.*, 411 F.2d 889, 894-95 (9 Cir. 1969).

Arbitration provisions are, of course, to be viewed separately from the other parts of the contract between the parties. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395. However, we submit that to order arbitration over objection that there has been a material breach of the *arbitration provision itself* radically alters the purpose of the United States Arbitration Act. That act originated as a congressional displacement of the common law hostility to the specific enforcement of arbitration agreements. While these agreements were concededly valid, the common law courts refused the remedy of specific enforcement.[8] The federal arbitration act alters that rule, of course. The im-

[7] Brief for Appellee at pp. 14-18.

[8] *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109. This left the plaintiff with the obviously ineffective remedy of nominal damages.

portant point is, however, that "the purpose of Congress ... was to make arbitration agreements as enforceable as other contracts *but no more so*. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co., supra,* 388 U.S. at 404 n.12. Current judicial enthusiasm for arbitration should not be permitted to obscure that fact. And surely, as we have shown, one could resist specific enforcement of any agreement where there has been a material breach of that agreement. Indeed, the labor cases, where there is an overriding congressional policy in favor of promoting arbitration (*Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652-56) recognize the possibility that a work stoppage might constitute such a material breach of an arbitration agreement that it would justify nonenforcement of the arbitration provisions.[9]

B.

The court of appeals advanced four reasons for concluding that the enforcement court could not consider any question *after* the making of the arbitration agreement except that of mutual recision.

First. The court of appeals thought that this Court's decision in *Prima Paint* v. *Flood & Conklin*, 388 U.S. 395 (1967) required that result. The court of appeals said that *Prima Paint* "interpreted section 4 as entirely limiting enforcement courts to 'issues relating to the making and performance of the agreement to arbitrate' 388 U.S. at 404." (App. p. 16)

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[9] Violation of a no-strike provision may, depending upon the factual context, constitute a material breach of the arbitration agreement. *Drake Bakeries, Inc.* v. *Local 50*, 370 U.S. 254, 265. In *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247, 253, Mr. Justice Harlan said: "Whether a fundamental and long-lasting change in the relationship of parties prior to the demand for arbitration would be a circumstance which, alone or among others, would release an employer from his promise to arbitrate we need not decide, since the undeveloped record before us reveals no such circumstance."

Surely the quoted language will not sustain the burden placed upon it by the court of appeals. Language takes its meaning from its context and *Prima Paint* was *not* concerned with whether an enforcement court should consider any events *after* the making of the agreement to aritrate. *Prima Paint* held only that the agreements to arbitrate were separate from other parts of a contract, and accordingly, that claims of fraudulent inducement were for the arbitrator unless the fraud was asserted to have been directed to the arbitration agreement itself. But, like other agreements, provisions for arbitration are "as enforceable as other contracts but no more so" (388 U.S. at 404 n. 12). *And it defies reason to assume that one party intended to remain bound on an arbitration clause when the other is in material breach thereof.* Here, petitioner alleges that respondent's permanent and total work stoppage constituted such a breach. In rejecting that position the court of appeals in effect made arbitration agreements a one way street: the owner gives up the right to have disputes resolved by the courts; it does not, however, receive the *quid pro quo* for arbitration—no work stoppage.

Second. The court of appeals said "we cannot even conclude that the work stoppage was a breach of Subparagraph 7.10.3 since the arbitration proceedings herein sought were not in existence when the alleged work stoppage occurred." (App. p. 17) The court was apparently referring to the fact that the work stoppage occurred, so it was alleged, *prior* to respondent's demand for arbitration, and Subparagraph 7.10.3 provides that the contractor shall "carry on the work . . . *during* any arbitration proceeding." Thus, the court apparently reasoned that the obligations of Subparagraph 7.10.3 applies only if a work stoppage occurred after — but not before — the demand for arbitration.

The court's analysis lacks substance. The purpose of Subparagraph 7.10.3 is plain; the contractor must remain on the job while disputes are being arbitrated. Under the view

of the court of appeals, however, Subparagraph 7.10.3 is meaningless; the contractor can walk away from the job and *then* demand arbitration without violating section 7.10.3. There is, we think, very little to commend such a construction of the obligations created by Subparagraph 7.10.3.

Third. The court of appeals said "the County's interpretation would add an implied exception to the two exceptions set forth in Subparagraph 7.10.7." (App. 17) But this too is wholly unconvincing. The entire arbitration clause, Subparagraphs 7.10.1 through 7.10.3—which, of course, includes the no work stoppage provision—must be read as a whole. What would the court of appeals have said if the contents of Subparagraph 7.10.3 were inserted in Subparagraph 7.10.1? Surely, it is plain that the court of appeals has elevated a matter of style to the level of substance. The evident intent of the arbitration clause taken *as a whole* is that the contractor's promise of no work stoppage is a *quid pro quo* for the agreement to arbitrate.

Fourth. The court said "finally and most importantly that interpretation would eviscerate arbitration of all but inconsequential disputes." Frankly, we do not understand this argument. A contractor has a right to insist upon arbitration of any disputes so long as it remains on the job.

Perhaps the court of appeals was concerned with the extent to which judicial consideration of an alleged material breach would involve the enforcement court in the merits of the underlying disputes between the parties. The answer to that concern is unclear. Of course, we do not suggest that the quality of a contractor's performance is for an enforcement court. The focus of the defense of material breach is, as we have said, *on the work stoppage* not the quality of the contractor's work. It does seem likely, however, that there will be some overlap between issues considered by the enforcement court and issues which would be otherwise referrable to arbitration. But that is no objection. The NLRB, for example, may consider events which might otherwise be

considered by a labor arbitrator.[10] Moreover, it is respondent's conduct in walking off the job which makes relevant the nature and quality of its performance. To the extent that the underlying merits are relevant in a judicial proceeding, it will occur in a narrow category of cases—namely, *when the contractor has walked off the job*, and it occurs only because the agreement between the parties imposes a no work stoppage rule as a reciprocal aspect of the obligation to arbitrate.

We submit that the question whether there has been a material breach of the arbitration agreement itself is for the enforcement court to decide. The material breach here alleged has nothing to do with the quality of Respondent's performance —it is, rather, concerned with the facts and events of Respondent's work stoppage. We submit that a total and complete cessation of work is, as a matter of law, a material breach of a no work stoppage agreement.[11] In any event, however, petitioner could establish the materiality of this breach at an evidentiary hearing. Petitioner would show the substantial harm in terms of delay and increased expense which resulted from the work stoppage.

Conclusion.

For these reasons, the writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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[10] See the discussion in the opinion White J., dissenting on another issue in *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, at 310-314.

[11] If it is not, it is difficult to perceive what conduct can constitute a material breach of such a provision.

APPENDIX

United States Court of Appeals
For the First Circuit

No. 71-1175.

COUNTY OF MIDDLESEX,

PLAINTIFF, APPELLANT,

v.

GEVYN CONSTRUCTION CORP.,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Henry Paul Monaghan, with whom *John Paul Sullivan*, *Foley, Hoag & Eliot*, *R. Robert Popeo*, *John P. Birmingham, Jr.*, and *Mintz, Levin, Cohen & Glovsky* were on brief, for appellant.

Leslie A. Hynes, with whom *Hynes & Diamond*, *Joseph T. Fahy*, *Cornelius J. Moynihan, Jr.*, *Peabody, Brown, Rowley & Storey*, *William D. Powers*, and *Robert J. Stern* were on brief, for appellee.

October 28, 1971

COFFIN, *Circuit Judge*. This issue arises, one of many, from a singularly unhappy contract to construct a courthouse for the County of Middlesex by Gevyn Construction Corp. After mounting difficulties in the spring of 1970, when the parties negotiated concerning a claim by Gevyn for damages for delay occasioned by additional work, each party's dissatisfaction with the other mounted to the point where Gevyn threatened to and allegedly did suspend work on the project and the County terminated its contract with

Gevyn. The County sued in the Massachusetts Superior Court, seeking a declaration that it was not obligated to arbitrate a number of matters pending before the American Arbitration Association, including the two at issue here—one being Gevyn's claim for delay damages and the other being its claim that the County wrongfully terminated the contract.

Gevyn removed the case to federal district court on diversity grounds. Eventually the County moved for a summary judgment that it was not required to arbitrate, while Gevyn moved for an order compelling arbitration and an injunction restraining the County from expending any of the unpaid balance for construction of the courthouse. The court granted neither summary judgment nor injunctive relief, but ordered the County to proceed with arbitration, meanwhile staying further judicial proceedings.

The County relies on two grounds to support its resistance to arbitration: (1) since it is prohibited by law from incurring liability in excess of legislatively authorized amounts, arbitration would be a futile act; and (2) since Gevyn allegedly committed a material breach of contract by stopping work, the arbitration clause itself should be treated as having been rescinded. Neither contention, in our view, has merit or warrants extended discussion.

The County's first argument, stripped to essentials, is simply that the maximum amount it could be forced to pay Gevyn is the contract price, excluding any damages for delay or termination. It cites statutes (Mass. G. L. c. 34 § 14 and c. 35 § 32) confining county expenditures and assumption of liabilities to amounts authorized or appropriated, and cases such as *Adams* v. *County of Essex*, 205 Mass. 185 (1910) voiding county contracts exceeding statutory authorization. While the obligating and spending authority of governmental units or departments is obviously dependent on proper authorization, suffice it here to say

that we distill no such principle of inherent illegality in governmental units subscribing to arbitration clauses in construction contracts as would prompt us to enjoin arbitration. *Cf. Dickstein* v. *DuPont*, 443 F. 2d 783 (1st Cir. 1971). Indeed, it has been held by implication that a Massachusetts town can enter a contract which provides for dispute settlement by arbitration rather than by lawsuit, *M. S. Kelliher Co.* v. *Wakefield*, 346 Mass. 645 (1964). We see no reason why the same rule would not be applied to counties. Even if there were no legal obligation binding the County to pay damages over and above the contract price, such would not render arbitration a "futile" act. The County, assuming that termination of the contract was justifiable, has, under the General Conditions (Article 14) the rights to offset the cost of completion and to recover any excess over the unpaid balance. Or an award in favor of Gevyn might involve an amount not in excess of the authorized price. Or, given the arbitrator's decision, the proper authorities might see fit to honor the award. In short, we think the legal obstacles sought to be raised by the County are premature and are no sufficient basis for refusing to arbitrate if the agreement to arbitrate still stands.

The County's second argument is made in the face of a broad arbitration clause,[1] covering "[a]ll claims, disputes and other matters in question arising out of, or relating to

[1] "7.10 Arbitration

7.10.1 All claims, disputes and other matters in question arising out of, or relating to this Contract or the breach thereof, except as set forth in Subparagraph 2.2.9 with respect to the Architect's decisions on matters relating to artistic effect, and except for claims which have been waived by the making or acceptance of final payment as provided by Subparagraphs 9.7.5 and 9.7.6, shall be decided by arbitration in accordance with the Construction Industry Arbitration Association [sic] then obtaining unless the parties mutually agree otherwise. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

this Contract or the breach thereof", excepting only decisions of the architect relating to artistic effect and claims waived by the making or accepting of final payment. An additional subparagraph of the clause also contains an undertaking by the contractor to "carry on the work and maintain the progress schedule during any arbitration proceeding."

The pertinent federal arbitration statutes, not claimed to differ significantly from Mass. G. L. c. 251 §§ 1 and 2(a), are 9 U.S.C. §§ 2 and 4. Section 2 states that a written agreement to arbitrate is enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." Section 4 requires a court to order arbitration "upon being satisfied that the making of the agreement or the failure to comply therewith is not in issue."

The County argues that (1) Gevyn's work stoppage was a material breach not only of the construction contract but of the arbitration clause itself; (2) that a material breach is a ground for revoking a contract; and (3) that therefore the arbitration clause is rendered invalid and as if it had never been made.

So much of the argument as points to breach of the contract as a whole flies in the face of *Prima Paint* v. *Flood & Conklin*, 388 U.S. 395 (1967), which interpreted section 4 as narrowly limiting the courts to those "issues relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404. In that case, the Court held that the question whether there was fraudulent inducement in the making of the contract as a whole was for the arbitrator. As the Seventh Circuit recently observed, *Prima Paint* "considerably narrowed the role of the court *vis-a-vis* the arbitrator." *Halcon International, Inc.* v. *Monsanto Australia Limited*, 446 F. 2d 156, 160 (7th Cir. 1971).

The County's principal effort with respect to the alleged breach of the arbitrator's clause is to try to derive support

by challenging the soundness of *World Brilliance Corp.* v. *Bethlehem Steel*, 342 F. 2d 362 (2d Cir. 1965), which held that the analogous defense of waiver of an agreement to arbitrate by extra-judicial action was for the arbitrators. By destroying a negative, it seeks to imply a positive. Its efforts are unpersuasive.[2] Moreover, *World Brilliance* has since had good company in *Halcon, supra*, which, in holding that laches was a matter for the arbitrators, stated that the only kind of defense which could "unmake" an agreement for arbitration was "an unmaking resulting from the mutual cancellation of the contract by the parties or the voiding of the transaction due to fraud, mistake or duress." 446 F. 2d at 159. The County's allegation that Gevyn breached the arbitration clause by failing to "carry on the Work and maintain the progress schedule during any arbitration proceedings" (Subparagraph 7.10.3) must be rejected *a fortiori*.

We make several further observations. To begin with, we cannot even conclude that the work stoppage was a breach of Subparagraph 7.10.3, since the arbitration proceedings here sought were not yet in existence when the alleged work stoppage occurred. Additionally, the County's interpretation would add an implied exception to the two explicit exceptions set forth in Subparagraph 7.10.1. Finally, and most importantly, that interpretation would eviscerate arbitration of all but inconsequential disputes. This is not and

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[2] Contrary to the County's assertion, we find *World Brilliance* entirely consistent with *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F. 2d 568 (2d Cir. 1968), which held that laches—except for delay prejudicing a party in presenting proof on an issue related to the making or performance of an agreement to arbitrate—is for the arbitrators. Moreover, the County confuses the kind of waiver dealt with in *World Brilliance* with the pursuit of legal remedy inconsistent with arbitration, the "default" situation contemplated in 9 U.S.C. § 3, dealt with in such cases as *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959), *cert. denied*, 364 U.S. 801 (1960), and *Hilti, Inc.* v. *Oldach*, 392 F. 2d 368 (1st Cir. 1968).

has long not been the law. *Bruno* v. *Pepperidge Farm*, 256 F. Supp. 865, 867-68 (E.D. Pa. 1966); *In re Pahlberg Petition*, 131 F. 2d 968, 970 (2d Cir. 1942). We therefore hold that the only grounds for revocation which meet the requirement of 9 U.S.C. § 2 are mutual agreement or a condition which vitiates agreement *ab initio*, i.e., fraud, mistake, or duress. For it is only this kind of "revocation" which can be harmonized with adjudication directed to "the making of the agreement for arbitration."

Affirmed.

MEMORANDUM AND ORDER

April 16, 1971

CAFFREY, D.J.

This matter came before the court on a motion for summary judgment filed by the County of Middlesex, plaintiff in Civil Action 70-991-C, and on a motion by the defendant in that case for an order directing plaintiff to proceed to arbitration, as well as an order to dismiss plaintiff's petition after ordering plaintiff to arbitration.

The matter also came before the court on the motion of various plaintiffs in Civil Action 70-1149-C for summary judgment which includes a prayer for an order that any arbitration award against Gevyn Construction Corp. shall be conclusive evidence in the suits by the plaintiffs against Travelers Indemnity Company in eight other civil actions pending before various judges of this court, and on motions of defendants Gevyn and Travelers to dismiss or stay the proceedings.

I.

The moving party on each of the motions for summary judgment indicated above has failed to establish the absence of an issue of material fact with regard to the controversy in which it seeks summary judgment. Consequently, all motions for summary judgment are denied.

II.

With regard to Gevyn's motion that the County of Middlesex be ordered to comply with the arbitration clause in the contract, I rule that the dispute between Gevyn and the County of Middlesex clearly falls within the provisions of paragraph 7.10.1 of the "General Conditions of the Contract for Construction," which provides in pertinent part as follows:

> "All claims, disputes, and other matters in question arising out of, or relating to, this contract or the breach thereof . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it."

In *Sears, Roebuck & Co.* v. *Glenwal*, —— F. Supp. ——, (S.D. N.Y. 1970), Judge Weinfeld held that the identical paragraph 7.10.1 embraced all matters relating to performance and breach of the contract. Accord, *Glen Acres, Inc.* v. *Cliffwood Corp.*, 353 Mass. 150, 154 (1967). And this view is reinforced by the 1966 amendment to paragraph 7.10.1 of the Standard Form of Contract of the American Institute of Architects which substituted for the clause, "All disputes, claims, or questions subject to arbitration under the contract shall be submitted to arbitration," a new clause reading, "All . . . matters in question arising out of or relating to this contract or the breach thereof . . . shall be decided by arbitration." Cf. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

The remaining contentions made by the County of Middlesex seeking to avoid arbitration are so insubstantial as not to warrant discussion or analysis thereof.

Accordingly, the motion of defendant in Civil Action 70-991-C that County of Middlesex proceed forthwith to arbitration is allowed, and the action is stayed pending arbitration.

The motions to dismiss in Civil Action 70-1149-C are denied and the motions to stay that action pending a final award of arbitration in Civil Action 70-991-C are allowed.

CAFFREY, D.J.

U. S. District Judge

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IN THE

Supreme Court of the United States

Court, U.S.
FILED
JAN 31 1972
E. ROBERT SEAVER, CLERK

October Term, 1971
No. 71-885

EDWIN O. WILLIS,

Appellant,

vs.

STATE BOARD OF CONTROL, State of California, and TRUSTEES OF CALIFORNIA STATE COLLEGES,

Appellees.

On Appeal From the Court of Appeal of the State of California, Fourth Appellate District, Division One

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-885

EDWIN O. WILLIS,

Appellant,

vs.

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Appellees.

On Appeal From the Court of Appeal of the State of California, Fourth Appellate District, Division One

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal from the judgment of the Court of Appeal of the State of California, Fourth Appellate District, be dismissed on the ground that it does not present a substantial federal question. Further, the decision below is so obviously correct that it warrants no further review. In the alternative, appellees move that the within appeal from the decision of the Court of Appeal be affirmed on the same grounds.

Opening Statement

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, upholds the validity of the first paragraph of the oath required by section 3 of Article XX of the California Constitution. Appellant refused to take the oath. He was denied employment as an associate professor of zoology at San Diego State College. He contends in his jurisdictional statement that the oath is so vague and overbroad as to impinge impermissibly upon the exercise of constitutionally protected rights; and also that the oath is invidiously discriminatory in violation of the Fourteenth Amendment of the Constitution of the United States because it is not required of state college faculty members who are aliens.

Section 3 of Article XX of the California Constitution, so far as pertinent here, provides as follows:

> "Members of the Legislature, and all public officers and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation:
>
> 'I, . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this

obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.' "

The decision of the Court of Appeal was so clearly correct that further consideration of appellant's contentions are not necessary.

A copy of the unpublished decision of the Court of Appeal is attached as an appendix to Appellant's Jurisdictional Statement. Since the decision refers with approval to pages 51-54 of the respondents' brief filed by appellees in the Court of Appeal, appellees have attached the text of said pages of their respondents' brief as an appendix to this motion to dismiss or affirm.

ARGUMENT

1. Recent decisions by this Court and by lower federal district courts have uniformly upheld the validity of similar state oaths, requiring a pledge of constitutional support as a condition to state employment against similar charges of unconstitutionality because of alleged abridgment of First and Fifth Amendment rights. *Knight v. Board of Regents*, 269 F. Supp. 339, aff'd per curiam 390 U.S. 36 (1968); *Hosack v. Smiley*, 276 F. Supp. 876, aff'd per curiam 390 U.S. 744 (1968); *Ohlson v. Phillips*, 304 F. Supp. 1152, aff'd per curiam 397 U.S. 317 (1970); *Connell v. Higginbotham*, 403 U.S. 207 (1971); *See* also *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 163-164 (1971).

Although, as the Court of Appeal recognized, the California oath is longer, it requires no more of the subscriber than the oaths of the other states considered in these decisions. Its meaning is not vague and it is not overbroad. As the Court of Appeal correctly stated:

> "It asks no more than simple recognition of our system of constitutional law, and demands no more of the California public employees than is required by Article VI, section 3 of the Constitution of the United States of all state and federal officers. (*See Connell v. Higginbotham, supra*, 91 S. Court 1772, 1773.)" (Juris. State, App. A4.)

An oath almost identical in form to California's oath is presently required of all officers and employees of the federal government (5 U.S.C.A. § 16) and has been required of such officers and employees since at least 1888 (*See* 23 U.S. Stats. 22).

The validity of the first paragraph of the oath set forth in section 3 of Article XX of the California Constitution has previously been upheld by the Court of Appeal of California in its decision in *Smith v. County Engineer*, 266 Cal. App. 2d 645 (1968).

2. The fact that the oath is not required of state college faculty members who are not citizens of the United States does not result in an arbitrary or capricious classification.[1]

There is a rational basis for this difference in treatment and hence it is not forbidden by the Fourteenth Amendment. *McGowan v. Maryland*, 366 U.S. 420, 426-27 (1961). It would be difficult, if not impossible, as a legal and practical matter, to require the oath of aliens who might otherwise be employed by public agencies. A state imposed requirement that nationals of foreign nations lawfully within this country, take an oath of allegiance to the United States and the State of California would be open to serious doubt on federal constitutional grounds as an invasion by the state of the sphere of immigration, naturalization and foreign relations reserved exclusively to the federal government. *See Purdy & Fitzpatrick v. State of California*, 71 Cal. 2d 566 (1969); *United States v. Pink*, 315 U.S. 203 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941). Moreover, the practical effect of requiring the oath of aliens would be to prohibit the employment of

[1]The exemption of aliens is created by statute. The Levering Act (Gov. Code §§ 3100-08) requires all civil defense workers to take the oath of allegiance set forth in section 3 of Article XX of the California Constitution; and for the purpose of that Act all public employees are civil defense workers, excluding aliens legally employed (Gov. Code § 3101). The appellees' answer to the First Amended Complaint herein admitted the oath is not required of members of the faculty of the California State Colleges who are aliens.

aliens who otherwise might be qualified to work for the state, or a county or city. An alien could not reasonably be expected to take an oath of allegiance to a country or state foreign to his own country of citizenship.

Appellant argues that classification on the basis of alienage is a "suspect classification" which invokes application of the close scrutiny standard of equal protection and that the standard is not met here because no compelling state interest is served by excluding aliens from the oath taking requirement. But aliens do not suffer any harm or injury as a result of exclusion from the oath taking requirement. Indeed, assuming *arguendo*, the oath imposes some burden on the First or Fifth Amendment rights of those required to take it, aliens benefit by the exclusion. We are aware of no authority, and appellant has cited none, which would support the proposition that a classification on the basis of alienage which does not discriminate *against* aliens is a "suspect classification" requiring application of the close scrutiny doctrine. On the other hand *Katzenbach v. Morgan*, 384 U.S. 641 (1966), supports the conclusion that the rational basis test is alone applicable to a benign classification on the basis of country of origin. Furthermore, obviously the very factors discussed above in support of the rationality of not requiring the oath of aliens also constitute legitimate and compelling reasons for excluding aliens from the oath taking requirement. Therefore, the exclusion is constitutional under either the rational basis or close scrutiny standards.

In any event, even assuming *arguendo* said factors do not constitute a rational basis or legitimate and compelling reasons for not requiring the oath of

aliens, the oath is nonetheless constitutional. There is no constitutional requirement that a regulation must reach every class to which it might be applied. There is no requirement that it be applied to other groups to which its application would be equally reasonable. *Hughes v. Superior Court of California*, 339 U.S. 460 (1949); *Ohlson v. Phillips, supra*, 304 F. Supp. 1152, 1155, aff'd per curiam 397 U.S. 317.

Conclusion.

Appellees' motion to dismiss or affirm should be granted.

Respectfully submitted,

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APPENDIX.

Accord, Ohlson v. Phillips, supra, 304 F. Supp. 1152, 1155.

E. *The Fact That Alien Members of the Faculty of the California State Colleges Are Not Required to Take the Oath Does Not Result in an Arbitrary and Unreasonable Classfication.*

On Page 27 of his brief, appellant states that, "the oath establishes an arbitrary and unreasonable classification;" and on page 18, appellant states that California's oath "is expressly limited to state employees who are citizens." To the extent that appellant thereby implies that section 3 of Article XX contains an *express* exemption for aliens, plaintiff errs. The exemption is created by statute. The Levering Act (Gov. Code §§ 3100-08) requires all civil defense workers to take the oath of allegiance set forth in section 3 of Article XX; and for the purpose of that Act, all public employees are civil defense workers, excluding aliens legally employed. (Gov. Code § 3101.)

Labor Code section 1941 generally prohibits the employment of aliens by the state, counties and cities. Labor Code section 1944 lists several exceptions to this prohibition, including any member of the faculty or teaching force of any college or university supported in whole or in part by the state.

The exemption in the Levering Act for aliens legally employed and the exceptions in Labor Code section 1944 to the prohibition against employment of aliens antedate the 1952 amendment to section 3 of Article XX of the California Constitution. Such evidence of intent as may be gleaned from a reading of the amendment and the ballot arguments disclose no purpose to im-

pose a blanket prohibition on alien employment by public agencies. Repeals by implication are not favored, and will occur only in cases of irreconcilable conflict; that is, when the inconsistency is such that concurrent operation of the two enactments is not possible. (*Railroad Commission v. Riley,* 192 Cal. 54 (1923); *Smith v. Mathews,* 155 Cal. 752 (1909).) The legislative intent behind a new law is of importance and may establish or deny a repeal by implication. (2 Sutherland, *Statutes and Statutory Construction* (3d ed. 1943), § 2102, pp. 5-10.) The constitutional amendment deals with one subject and Labor Code section 1944 with another. The collision, if any, between the constitutional amendment and Labor Code section 1944 would be entirely fortuitous.

It would be difficult, if not impossible, as a legal and practical matter, to require the oath of aliens who may otherwise be employed by public agencies. A state-imposed requirement that nationals of foreign nations, lawfully within this country, take an oath of allegiance to the United States and the State of California would be open to serious doubt on federal constitutional grounds as an invasion by the state of the sphere of immigration, naturalization and foreign relations reserved exclusively to the federal government. *See Purdy & Fitzpatrick v. State of California,* 71 A.C. 587 (1969);[20] *United States v. Pink,* 315 U.S. 203 (1942); *Hines v. Davidowitz,* 312 U.S. 52 (1941). Moreover, the practical effect of requiring the oath of

[20]In its 1970 session, the Legislature enacted Assembly Bill 1057 (Stats. 1970 ch. 653), to repeal Article 2 (commencing with section 1940) of chapter 2 of Part 7 of Division 2 of the Labor Code. Subject to the referendum provisions of the California Constitution, said act will become effective in November of 1970.

aliens would be to prohibit the employment of aliens who otherwise might be qualified to work for the state, a county, or a city under Labor Code section 1944. This is so because an alien could not reasonably be expected to take an oath of allegiance to a country or state foreign to his own country of citizenship. This practical limitation, as well as the constitutional limitations on the authority of the state to regulate with respect to such a matter, affords a reasonable basis for treating aliens differently from citizens insofar as the oath requirement is concerned. The Fourteenth Amendment does not forbid classification or discrimination; it prohibits only arbitrary and capricious action. The test is not whether a statute discriminates or classifies, but whether a statutory discrimination has a rational basis. A statute is presumed to be valid, and a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland;* 366 U.S. 420, 426-27 (1961).

Furthermore, even assuming, *arguendo*, that there were no practical or constitutional inhibitions against application of the oath to aliens, there is no constitutional requirement that a regulation must reach every class to which it might be applied. *Hughes v. Superior Court of California,* 339 U.S. 460, 94 L. Ed. 985 (1949); *Ohlson v. Phillips, supra,* 304 F. Supp. 1152, 1155, 90 S. Ct. 1124, affirmed per curiam. There is no requirement that it be applied to all other groups to which its application would be equally reasonable.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-885

COUNTY OF MIDDLESEX,

Petitioner,

vs.

GEVYN CONSTRUCTION CORP.,

Respondent.

Supreme Court, U.S.
FILED
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

Supreme Court of the United States

COUNTY OF MIDDLESEX, *Petitioner,*

vs.

GEVYN CONSTRUCTION CORP., *Respondent.*

BRIEF OF RESPONDENT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Opinions and Arguments Below.

The opinions of the Circuit Court and the District Court of Massachusetts appear in the Appendix to the Petition[1] and are not repeated herein. The opinion of the Circuit Court on Petitioner's (County's) Motion For a Stay of Mandate is set forth in the Appendix[2] hereto.

Question Presented

Did the lower Courts properly order the County, pursuant to Title 9 U.S.C. § 4 (Federal Arbitration Act), to proceed to arbitration after having first satisfied themselves (a) that the parties had made an agreement in writing to submit to arbitration and (b) that the County had failed to comply with the agreement to arbitrate.

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[1] Appendix to Petition pp. 13-20. The Court of Appeals decision is now officially reported at 450 F. 2d 53 (1 Cir. 1971).

[2] Appendix p. 14.

Statutes Involved

Sections 2 and 4 of the Federal Arbitration Act are set forth in full in footnotes to the Petition[3] and are not repeated herein except to the extent necessary under "Grounds For Denying The Writ," set forth herein.

Statement of the Case

On October 27, 1967, Respondent (Gevyn) and the County entered into a written agreement (Construction Contract) pursuant to the Massachusetts public contracting statutes[4] whereunder Gevyn agreed, in consideration of the payment of $21,861,000, to construct the superstructure for the Middlesex County Superior Courthouse, Cambridge, Massachusetts.

After entering into the Construction Contract, Gevyn discovered that the Construction Contract plans and specifications did not correctly represent the condition of the foundations previously constructed by another contractor for the County. The County directed Gevyn to, and it did, perform substantial corrective work on the foundations for which it received payment. In addition, however, the foundation conditions caused extensive changes both in the time and manner of performance of Gevyn's original contract work. A claim by Gevyn and its subcontractors against the County in the approximate amount of $5,400,000 for the additional cost of performance was asserted but payment was refused.

In addition to the County's failure to pay the foundation claim, the County, in May, 1970 failed and refused to make regular Construction Contract progress payments to Gevyn,

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[3] Petition pp. 2-3, footnotes 1 and 2.

[4] Massachusetts General Laws Chap. 30 provide for advertisement, receipt and public opening of bids and award to the lowest responsible bidder.

and Gevyn gave written notice of default to the County pursuant to the provisions of the Construction Contract. Under date of May 19, 1970, when the County was in default because of its failure to make payment and for various other reasons, the County, claiming an alleged work stoppage (one of the many issues disputed by Gevyn) notified Gevyn of its intention to terminate Gevyn's further performance under the Construction Contract. Thereafter, the County notified Gevyn that its performance of the Construction Contract was terminated effective May 27, 1970.

Concededly, there were many serious disputes between Gevyn and the County which culminated in the termination by the County of Gevyn's further performance under the Construction Contract. Each party claims that the Construction Contract was breached by the other.

Gevyn, after termination of the Construction Contract and under date of May 28, 1970, filed a demand for arbitration with the Construction Industry Tribunal of The American Arbitration Association in connection with the foundation work, in the amount of $5,400,000, and under date of July 9, 1970, filed another demand for arbitration (amount then indeterminate) in connection with the termination of the Construction Contract by the County. The two arbitrations have now been consolidated.

Grounds for Denying the Writ

The County asserts, as grounds for the granting of the requested writ, an alleged ". . . issue of great importance in the administration of the federal arbitration act . . .",[5] and one presumably considered and incorrectly determined by the Courts below.[6] We respectfully submit that not only

[5] Petition, p. 7.

[6] The County at p. 6 of the Petition incorrectly characterizes this issue as whether ". . . a court may not order arbitration unless it has been satisfied that there has been no material breach of the arbitration agreement between the parties."

is the County in error in its characterization of the issues properly to be considered by the court under Title 9, U.S.C. and in fact considered by the Courts below, but is posing a non-existent issue of statutory interpretation and one which in any event is not germane factually to the case at bar. An alleged "issue of great importance" does not in fact exist in this case.

After the County had refused to proceed to arbitration, Gevyn petitioned the District Court for an order pursuant to Title 9 U.S.C. § 4 directing the County to proceed to arbitration in accordance with the broad form agreement to arbitrate between the parties.[7]

After a long and arduous journey through the Courts below, during which the County asserted every conceivable, and many inconceivable, arguments for resisting arbitration[8] (with the net effect of delaying the intended speedy remedy of arbitration for over one and one-half years), the Circuit Court characterized the County's arguments as frivolous[9] and directed that the County submit to the arbitral forum to which it had contractually committed itself.

The County argues that an alleged (but disputed) work stoppage by Gevyn constituted a breach not only of the Construction Contract but an independent breach of the agreement to arbitrate contained therein, affording to the County a claimed right to disaffirm the agreement to arbi-

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[7] The broad form agreement to arbitrate "All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, . . ." is set forth in full in the Appendix to the Petition, p. 15, footnote 1.

[8] At various points in these proceedings the County, in its quest to find reasons why it should not arbitrate in accordance with its contractual obligation, has asserted twelve different grounds. In this Petition the County has now discarded all but the last of its arguments.

[9] Denial of the County's Motion for Stay of Mandate. Appendix p. 14.

trate,[10] notwithstanding that such a disputed issue of breach by the express terms of the agreement to arbitrate is clearly encompassed within the scope of the arbitration agreement.[11] The record below clearly demonstrates that whether the alleged work suspension even occurred[12] was but one of several vigorously contested and substantial disputes between the parties which culminated in the termination of the Construction Contract by the County and the subsequent commencement of arbitration by Gevyn.

Section 4 of the Federal Arbitration Act was enacted to provide a speedy remedy for an aggrieved party to compel a recalcitrant party to proceed to arbitration when it has either failed or refused to do so. In the instant case the County refused to proceed to arbitrate claims by Gevyn and its subcontractors in excess of $9,000,000.

Section 4 provides in pertinent part as follows:

> "*A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate* under a written agree-

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[10] Consistency of position has not been the earmark of the County's efforts. The position the County now asserts is inconsistent with its course of conduct when the alleged breach occurred at which time the County did not send a notice of rescission of the arbitration agreement but, in fact, served a notice of termination of performance under the Construction Contract and the damages which it asserts (Petition p. 12) are clearly damages flowing from a breach of the Construction Contract and not the arbitration agreement. Furthermore the County, *after* termination of the Construction Contract and commencement of this litigation participated in two other arbitrations with Gevyn concerning two extra work disputes arising under the Construction Contract and did not therein assert rescission of the Arbitration Agreement.

[11] The Court below clearly recognized that ". . . the County's interpretation would add an implied exception to the two explicit exceptions [from the scope of the agreement to arbitrate] set forth in Subparagraph 7.10.1". Appendix to Petition p. 17.

[12] Gevyn performed $487,711.00 of work after the date the County alleges that the work suspension occurred. Accordingly the County's contention is patently absurd. Brief for Appellee at p. 10.

ment for arbitration *may petition* any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, *for an order directing that such arbitration proceed in the manner provided for in such agreement.*" (Emphasis added)

Section 4 also provides a clear cut limitation on the jurisdiction of district courts in implementing their purpose, as follows:

"... *The court* shall hear the parties, and *upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,* the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement ..." (Emphasis added)

Thus, under a § 4 application the courts are clearly limited to deciding two issues: (a) the "making" of the arbitration agreement, and (b) the failure or refusal of the *other*[13] party to arbitrate. The Courts below, after satisfying themselves that the two statutory prerequisites existed, entered an order pursuant to § 4 directing the County to proceed forthwith to arbitration.

The County does not deny (a) that the agreement to arbitrate was validly made and effectively bound the parties to arbitrate, and (b) that it has refused to arbitrate. Thus, the statutory criteria mandating the issuance of an order compelling arbitration under § 4 have been satisfied. However, the County has attempted to enlarge the issues

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[13] See *World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F. 2d 362 (2 Cir. 1965) wherein the Court rejected the contention that the "failure, neglect or refusal" set forth in § 4 could refer to alleged laches on the part of the party seeking to compel arbitration and held that this inquiry applied solely to the recalcitrant party seeking to resist arbitration.

properly to be considered by the court by presenting a variety of other, but inapplicable, arguments.

The County argues (under the guise of interpreting the word "revocation" in the savings clause of Title 9 U.S.C. § 2)[14] that the court must first examine into and *adjudicate* the merits of the County's claim of breach (the disputed work suspension) as a prerequisite to determining whether to exercise its power to compel the recalcitrant County to arbitrate. The County, in advancing this contention, is attempting to bootstrap itself into the Supreme Court by a characterization of dicta in the Circuit Court decision below and dicta in *Halcon International, Inc.* v. *Monsanto Australia, Ltd.*,[15] which characterization in the factual context of this case is neither correct nor in point. The Circuit Court below and the Circuit Court in the *Halcon* case, in dicta, made reference to mutual cancellation of an agreement to arbitrate. *No issue exists in the case* at bar or existed in the *Halcon* case, *concerning any mutual cancellation* of the agreement to arbitrate. In the latter case the issue raised was alleged laches on the part of the party seeking arbitration and in the case at bar the issue posed is an alleged, but disputed, work suspension by the party seeking to compel arbitration.

In both Circuit Court decisions, the Courts' observation was clearly not intended as the broad general proposition urged by the County herein. In the case at bar, the Circuit Court clearly recognized that a claim of breach (even including a claim of total non-performance and total repudiation) is not grounds for evading a broad form arbitration agreement when it stated:

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[14] "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" (Emphasis added)

[15] 446 F. 2d 156 (7 Cir. 1971), Cert. denied 404 U.S. ——.

". . . that interpretation [such as urged by the County regarding alleged breach] would eviscerate arbitration of all but inconsequential disputes. This is not and has long not been the law. *Bruno* v. *Pepperidge Farm,* 256 F. Supp. 865, 867-68 (E.D. Pa. 1966); *In re Pahlberg Petition,* 131 F. 2d 968, 970 (2 Cir. 1942)."[16]

In the case at bar the broad form arbitration agreement, by its express language, encompasses "*All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof . . .*" (Emphasis added) and thus, the County's claimed right of unilateral rescission arising out of Gevyn's alleged breach (disputed work suspension) raises an issue clearly within the scope of the arbitration agreement.

Presumably in other agreements to arbitrate, less broad in scope than the one involved here, courts, under §4 of Title 9 U.S.C. (in determining the "making" of the agreement to arbitrate), would be required to determine whether a dispute concerning mutual cancellation of the arbitration agreement or concerning an alleged breach which is claimed to give risie to a right of unilateral rescission, falls within or without the scope of the particular agreement to arbitrate, i.e., whether the parties "made" an agreement to submit those particular disputes to arbitration. The court would not, under such an exercise of jurisdiction, be determining whether a dispute concerning mutual cancellation or a breach allegedly giving rise to a claimed right of unilateral rescission, served to "unmake" the agreement to arbitrate as the County suggests.

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[16] Appendix to Petition, p. 17. See also *The Pahlberg* approach as illustrated by other cases. See e.g., *Eastern Marine Corporation* v. *Fukaya Trading Co.,* 364 F. 2d 80, 84-85 (5 Cir. 1966) Wisdom, J.; *Formigli Corporation* v. *Alcar Builders, Inc.,* 329 F. 2d 79 (3 Cir. 1964).

The Circuit Court in *World Brilliance Corp.* v. *Bethlehem Steel Co.*[17] expressly set forth the correct interrelationship of the "savings clause" in § 2 of Title 9, U.S.C., with a determination by the courts as to the "making" of the agreement to arbitrate under a § 4 application to compel arbitration when it stated at page 364:

> "Furthermore, we hold that the exception in Section 2 of the Act, which makes a commercial arbitration agreement valid and enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract,' is not applicable to the defense of waiver. 'Revocation' does not, in this setting, refer to annulment by the parties themselves of an otherwise valid and enforceable contract. It applies only to cases in which the courts will step in and rescind the agreement, for reasons such as fraud, duress, or undue influence. Cf. Robert Lawrence, Supra, at 410-411."[18]

In *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*[19] wherein a controverted claim of unilateral rescission arising from allegedly fraudulent conduct of one of the parties was urged, the Circuit Court stated that under a broad form arbitration clause any such dispute was for the arbitrators. The court said at page 411:

> "In the view we take of the case before us it is immaterial that Lawrence claims to have rescinded the contract and that Devonshire disputed this claim and asserts that Lawrence by later inconsistent acts waived any right to rescind. We say there was a valid agreement to arbitrate, that all that remains is to construe the agreement and that the controversy over fraud in

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[17] 342 F. 2d 362 (2 Cir. 1965).

[18] Cf. *Trafalgar Shipping Co. Ltd.* v. *International Milling Company*, 401 F. 2d 568 (2 Cir. 1968).

[19] 271 F. 2d 402 (2 Cir. 1959).

> the inducement, whether Lawrence affirmed or disaffirmed the contract and attempted to or did rescind it, is a 'complaint, controversy or question' which arose 'with respect to this contract'."

The County relies upon *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*[20] for its erroneous conclusion that it can resist arbitration by alleging a material breach of the arbitration agreement and thereby shift questions pertaining to the continued operability of the arbitration agreement out of the arbitral forum and into the courts. On page 9 of the Petition the County seizes upon footnote 12 of the *Prima Paint* decision, as was attempted in the *Halcon* case, *supra,* and urges that the words ". . . enforceable as other contracts, but not more so . ..." mandate inquiry into conduct occurring after the formation of the arbitration agreement. However, it is clear when the entire comment of the Court in *Prima Paint,* 338 U.S. at 404 n. 12, is read and considered in context[21] that it fails to support the County's position because it deals with revocation *ab initio* and not conduct after formation of the arbitration agreement.

Furthermore, neither the labor case alluded to by the County nor other cases in the field of labor arbitration provide support for its contention, and in any event are wholly inapplicable because they arise out of (a) a completely different statutory context (§ 301 of the Labor

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[20] 338 U.S. 395 (1967).

[21] "This position is consistent both with the decision in *Moseley* v. *Electronic Facilities,* 374 U.S. 167, 171, [illegible] (1963), and with the statutory scheme. As the 'saving clause' in § 2, indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract—a situation inconsistent with the 'saving clause.'"

Management Relations Act) and (b) contractual relationships which cannot be considered analogous to those in the commercial arbitration setting.

The County attempts to obfuscate the court's clear cut and limited function under § 4 of Title 9 U.S.C., to determine the "making" of an agreement to arbitrate which encompasses the disputes between the parties, by urging an unauthorized examination by the court into disputed post-arbitration agreement conduct which in the case at bar is clearly within the scope of the broad form agreement to arbitrate.[22]

Although clearly in dispute, *if* the alleged suspension had actually occurred and were treated as though occurring "during the pendency" of the arbitration[23] such a set of facts, if accepted, *arguendo,* does not cause or give rise to the legal effect asserted by the County; for if they did, the effectiveness of every agreement to arbitrate could be negated by the recalcitrant party merely claiming a breach of the arbitration agreement, thereby laying a basis for judicial determination rather than determination by the arbitrators.

To permit such inquiry by the Court, as is urged by the County, would open the door to persistent invocation of the judicial forum upon such assertions of breach by the party seeking to resist arbitration. This flies in the face

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[22] Just such an argument was rejected by the Second Circuit in *World Brilliance,* when it discussed the analogous defense of waiver at p. 364: "The claim that a defense of waiver raises an issue relating to 'the making of the arbitration agreement' stretches the language of the statute beyond tolerable limits . . . ".

[23] The Court below noted that ". . . we cannot even conclude that the work stoppage was a breach of Subparagraph 7.10.3, since the arbitration proceedings here sought were not yet in existence when the alleged work stoppage occurred." Appendix to Petition p. 17.

of the repeatedly enunciated federal policy to promote the prompt disposition of disputes by arbitration.[24]

When one reflects on the breach alleged by the County in this case (the alleged but disputed work suspension) it is evident that a determination of that dispute necessarily entails an examination of the entire relationship between the parties (i.e., whether the County ever acted upon the alleged breach or waived it; whether there were prior breaches by the County; and a multitude of other interrelated factual and legal contentions).[25] Aside from the limited judicial inquiry permitted under Title 9 U.S.C., it is readily apparent that in any event there is no line of separability among the multitude of interrelated issues in dispute here so as to permit the court to make the sterile determination that the County seeks, as distinguished from the determinations to be made by the arbitrators. It would be folly for the courts to take concurrent jurisdiction with the arbitrators to determine the very same issues which the parties have agreed to arbitrate, and such judicial activity would be contrary to the very narrow role prescribed for the courts by § 4.[26]

Conclusion

The County asserts jurisdiction under Title 28 U.S.C. § 1254.[27] However, Gevyn submits that there is no sub-

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[24] See *World Brilliance, supra; Carcich* v. *Rederi A/B Nordie,* 389 F. 2d 692, 696 (2 Cir. 1968) ". . . there is an overriding federal policy favoring arbitration"; *Metro Industrial Painting Corp.* v. *Terminal Construction Co.,* 287 F. 2d 382, 385 (2 Cir. 1961) "In view of the federal policy to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration . . .".

[25] See *Robert Lawrence, supra* at p. 10.

[26] See Note 21 U.Chi. L. Rev. 719 (1954).

[27] Petition at p. 2.

stantial question for consideration by the United States Supreme Court. The "issue" as determined by the Courts below is in harmony with previous holdings by the other circuit courts which have uniformly interpreted §§ 2 and 4 of the Federal Arbitration Act in the same manner as did the Court below in its decision rejecting the County's argument.[28]

The Circuit Court's decision in the *Halcon* case, involving an analogous legal contention, i.e., alleged laches as a bar to arbitration, was cited by the Court below in support of its decision.

On November 9, 1971 the Supreme Court denied *certiorari* in the *Halcon* case.[29] This Court's denial of *certiorari* in the *Halcon* case is wholly consistent with its decision in *Prima Paint Corp.*

It is well established that the jurisdiction of the Supreme Court to review by *certiorari* should be sparingly exercised, and only in cases of peculiar gravity and general importance, or to secure uniformity of decisions. Gevyn respectfully urges that the "issue" which the County seeks to place before this Court is neither novel, substantial nor one which requires any clarification by this Court. The Petition for Certiorari should be denied.

Respectfully submitted,

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ROBERT J. STERN

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[28] See *World Brilliance Corp., supra,* (2 Cir.); *Trafalgar Shipping Co., supra,* (2 Cir.); *Halcon International Inc., supra,* (7 Cir.); *Robert Lawrence, supra,* (2 Cir.); and *Eastern Marine Corp., supra,* (5 Cir.).

[29] No. 71-388, October Term, 1971.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 71-1175.

COUNTY OF MIDDLESEX,

Plaintiff, Appellant,

v.

GEVYN CONSTRUCTION CORP.,

Defendant, Appellee.

Before ALDRICH, Chief Judge,

McENTEE and COFFIN, Circuit Judges.

MEMORANDUM and ORDER

ENTERED: November 12, 1971

The motion for stay of mandate is denied.

In its original opinion it was only out of respect to counsel that the court failed to state that it considered appellant's interpretation of the word "revocation" as used in this statute to be frivolous.

By the Court:

/s/ Dana H. Gallup
Clerk

(cc: Messrs. Monaghan, Hynes and Moynihan)